The Central Law Journal.

SAINT LOUIS, AUGUST 22, 1879.

CURRENT TOPICS.

In *Baker v. Cushman*, decided in the Supreme Judicial Court of Massashusetts at its last term, it was held that where a convention of a city council, assembled for the purpose of electing city officers, proceeds to ballot for the choice of an officer, and a greater number of votes is cast than the number of members present and voting, it is within the lawful power of the convention, at the same meeting and before the result of the election has been declared, to treat the proceedings already had as irregular and invalid, and to vote anew. The case arose on a petition for a writ of *mandamus* to compel the delivery of the official papers and seal to the petitioner. The record of the city council, was as follows: "Upon motion a ballot was taken for city clerk. The whole number of votes cast was thirty-two (32). William S. Baker had seventeen (17), Laurens N. Francis had one (1), James M. Cushman had fourteen (14). The whole number of votes cast being thirty-two (32), and the number of qualified members being only thirty one (31), the vote was declared void, and the convention proceeded to ballot again, with the following result: Whole number of ballots thirty-one (31). William S. Baker had fourteen (14), James M. Cushman had seventeen (17) and was declared elected. Upon motion, the convention dissolved." GRAY, C. J., who delivered the opinion of the court, said: "Whether we look to the record only, or to the facts found by the judge before whom this petition was heard, it does not appear that there was a complete election of the petitioner to the office of city clerk; but it does appear that the vote by which he appeared to be elected was immediately declared void, and the convention at once proceeded to another vote, in which all the members took part, resulting in the election of the respondent, and that he was accordingly declared to be elected. It was within the lawful power of the convention, at the same meeting and before the result of the election had been declared, to treat the proceedings already had as irregular and invalid, and to vote anew. The petitioner, therefore, acquired no right to the office. State v. Foster, 2 Halst. 101."

Bills of lading, properly indorsed, are symbols of the property covered by them, serving all the purposes of actual possession, and so remain until there is a valid and complete delivery of the property to some person entitled to the possession under the bills of lading. In the recent case of *Heiskell v. Farmers and Mechanics National Bank*, 7 W. N. 249, a quantity of cotton was shipped from Galveston to Philadelphia *via* New York, and the bills of lading therefor, in the name of A., properly indorsed, forwarded together with drafts on the purchaser for the price of the cotton, to a bank in Philadelphia for collection, with directions to hold the bills of lading until payment of the drafts, this being in accordance with the terms of the sale. The cotton was reshipped from New York, new bills of lading being issued in a new name, and was delivered at Philadelphia by the carrier (the original bills of lading remaining in possession of the bank), to the purchaser in this city, who obtained from B. an advance of $10,000 thereon. In replevin by the bank against B., it was held by the Supreme Court of Pennsylvania that the delivery was unauthorized, and that the bank was entitled to recover. See, also, Dows v. National Exchange Bank, 1 Otto, 618; Stollenwerck v. Thatcher, 115 Mass. 224; Alderman v. Eastern Railroad, Id. 233; Meyerstein v. Barber, L. R. 2 C. P. 661; Turner v. Trustees, etc., 6 Exch. 543; Jenkyns v. Brown, 14 Q. B. 496; Henry v. Warehouse Co., 31 P. F. Smith, 76; Benjamin on Sales, §§ 381, 382, and note. In Meyerstein v. Barber, advances had been made on cotton shipped from Madras to London, and bills of lading delivered to secure the lender. It was there said by Chief Justice Erle: "If it were established that a bill of lading—one of the most frequent securities for advances amongst mercantile men—becomes exhausted and ceases to be a security when the ship has reached her destination, and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud! It is scarcely possible to exaggerat

the evil consequences which would be likely to flow from such a doctrine. There is no authority for it." In a concurring opinion it is said: "There can be no complete delivery of the goods under a bill of lading until they come into the hands of some person who has a right to the possession under it."

The case of *Ho Ah Kow v. Nunan*, recently decided by Mr. Justice FIELD, in the United States Circuit Court for the District of California, has attracted much attention throughout the country, and would seem to have placed another barrier in the way of legislation against—on the Pacific coast at least—a very unwelcome class of immigrants. Though a Chinamen is not a citizen, and can not be, (*In re.* Ah Yup, 6 Cent. L. J. 38) there are still it seems some rights of his which States and legislators are bound to respect. In the case at bar, the plaintiff sued the defendant for trespass, the trespass consisting in having cut off the queue of the plaintiff, a queue being worn by all Chinamen, and its deprivation being regarded by them as degrading, and as entailing future suffering. The defendant pleaded that he was the sheriff of the city and county of San Francisco, and that the act referred to had been done by him while the plaintiff (who had been committed for five days in default of a fine of $10) was confined in the county jail under authority of a city ordinance, which declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, shall, immediately upon his arrival at the jail, have the hair of his head "cut or clipped to a uniform length of one inch from the scalp thereof," and it is made the duty of the sheriff to have this provision enforced. The plaintiff then denied the validity of the ordinance, first, because it exceeded the power of the county authorities to pass such a law; and second, because it was unconstitutional as inflicting a cruel and unusual punishment on one class of persons alone. Mr. Justice FIELD held that both positions were well taken. On the first he said:

"No one would pretend that the board of supervisors could, for any breach of a municipal regulation, or any violation of the consolidation act, declare that a man should be deprived of his right to vote, or to testify, or to sit on a jury, or that he should be punished with stripes, or be ducked in a pond, or be paraded through the streets, or be seated in a pillory, or have his ears cropped, or his head shaved. The cutting off the hair of every male person within an inch of his scalp, on his arrival at the jail, was not intended and can not be maintained as a measure of discipline or as a sanitary regulation. The act has no tendency to promote either discipline or health. The close cutting of the hair which is practiced upon felons in the State penitentiary, like clothing them in striped pants, is to distinguish them from others, and thus facilitate their capture in case of escape. They are measures of precaution. Nothing of this kind is practiced or would be tolerated with respect to persons confined in a county jail for simple misdemeanors, most of which are not of a very grave character. The plaintiff in this case, who has the option of paying a fine of $10 or imprisonment for five days, required no such clipping of the hair for the purpose of discipline or detention. It was done designedly to add torture to his confinement."

The constitutional question was considered at greater length:

"It is special legislation on the part of the supervisors against a class of persons who, under the Constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only for the Chinese in San Francisco. This was avowed by the supervisors on its passage. It was so understood by every one, and it is not enforced against any others. The reason advanced for its adoption, and now urged for its continuance, is that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinaman will not accept the alternative which the law allows of working out his fine by imprisonment, and the State or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumbscrew, or the rack, would accomplish the same end; and no doubt the Chinaman would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character was possible. Upon the Chinese prisoners its enforcement operates as 'a cruel and unusual punishment.' Many illustrations might be given where ordinances, general in their terms, would operate only upon a special class, or upon a specific class with exceptional severity, and thus incur the odium and be subject to the legal objection of intended hostile legislation against them. We have, for instance, in our community, a large number of Jews. They are a highly intellectual race, and are generally obedient to the laws of the country. But, as is well known, they have peculiar notions with respect to the use of certain articles of food which they can not be forced to disregard without extreme pain and suffering. They look, for example, upon the eating of pork with loathing. It is an offense against their religion, and is associated in their minds with uncleanness and impurity. Now, if they should, in some quarter of the city, overcrowd their dwellings and thus become amenable, like the Chinese, to the act concerning lodging-houses and sleeping apartments, an ordinance of the supervisors requiring that all prisoners confined in the county jail should be fed on pork, would be seen by every one to be levelled at them; and, notwithstanding its general terms, would be regarded as a

special law in its purpose and operation. During various periods of English history, legislation, general in its character, has often been enacted with the avowed purpose of imposing special burdens and restrictions upon Catholics; but that legislation has since been regarded as not less odious and obnoxious to animadversion than if the persons at whom it was aimed had been particularly designated. But in our country hostile and discriminating legislation by a State against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the Fourteenth Amendment of the Constitution."

RETROACTIVE LAWS AFFECTING INDIVIDUAL LIABILITY OF STOCKHOLDERS.

The liability of a stockholder in a private corporation has its inception at the time of his subscription. He may or may not, by such subscription, become individually liable to the creditors of the corporation beyond the amount of stock subscribed. Whether he does or not, and the extent of his liability, if any exists, will be determined either by the general law in force at the time, or by the provisions of the charter. When at the date of the subscription no liability attaches beyond the stock subscribed, a subsequent statute by which his liability is increased, will be retroactive upon his rights. On the other hand, if the terms of his subscription prescribed by the charter or the general law in force at the time imposes individual liability for the debts of the corporation, a subsequent act of the legislature releasing him therefrom would be retroactive upon the rights of creditors of the corporation who gave it credit prior to such act.

When the liability exists by virtue of a general statute, it furnishes an example of laws which enter into and form part of contracts made when such laws are in force. Accordingly where a company was organized under the provisions of a statute by which the members were rendered individually liable for the company's debts, as partners, a subsequent act repealing so much of the former law as imposed this liability, was held only to affect debts subsequently contracted.[1]

It has been laid down as a reason why a law which affected pre-existing liabilities of this kind should be sustained, that there was no contract between the stockholder and the creditors, the obligation of which would be thereby impaired.[2] This is probably true in the narrow sense that the transaction which gave rise to the liability did not take place between them. The stockholder may have purchased his shares without any reference to the particular indebtedness with respect to which his liability is sought to be enforced. The credit may have been given without any knowledge of who the stockholders were, much less with any understanding, express or implied, that this particular stockholder would be individually liable for the debt due this particular creditor. But it is not alone necessary to consider who *makes* the contract—between what parties the stipulations pass, and who was the immediate promissor. The proper order of inquiry should be—*Is there a contract?* And next—*Upon whom rests the obligation?* When credit is given to a corporation there can be no doubt that there is a contract between it and the creditor, and where the duty of payment rests upon the individual stockholders, we are required to seek no further for the obligation. The *obligation* of contracts is protected by the Constitution from impairment by State laws, without reference to such questions as who were parties or privies.[3]

When one person for a valuable consideration enters into a contract with another to perform an act for the benefit of a third party, the promissor is so far under an obligation to the beneficiary that the latter may maintain an action against him for breach. The promissor would not be allowed to impair this obligation by a rescission of the contract, after its acceptance by the third party.[4] For the same reason the obligation of this contract would be protected against subsequent legislative impairment.

In Cummings v. Maxwell,[5] no doubt was expressed that the law in force at the date of subscription imposed this obligation upon the stockholders. The only question in that case material to the present inquiry was whether it was competent for the legislature, by a retroactive law, to release him from such liability. The defense of such statutes, upon

(1) Conant v. Schaick, 24 Barb. 87; Day v. Wood, Ib. 99; McKinney v. Phillips, Ib. 100.

(2) Cummings v. Maxwell, 45 Me. 190. See, also, Com. v. Cochituate Bank, 3 Allen, 42; Gray v. Coffin, 9 Cush. 192; Longly v. Little, 26 Me. 162; Wheeler v. Frontier Bank, 23 Me. 308.

(3) Const. U. S., art. I, § 10.

(4) Bassett v. Hughes, 43 Wis. 319.

(5) *Supra.*

the ground that they simply amount to a regulation of remedies, would be equally valid in support of a law which undertook to discharge sureties upon statutory bonds, after the liability had accrued. The right of action would still exist against the principal. The force of the parallel is not materially diminished by the fact that sureties are contracting parties and stockholders are not, admitting that the latter sustain no such relation to the creditors of the corporation. In neither case would the obligation of the contract be utterly destroyed, but by releasing one of the obligors it would be *impaired*. The object of the provision is not to deprive any particular class of obligors of the benefits of such impairment, but to protect the beneficiaries of contracts from loss. It would be immaterial to the latter who was benefitted by the change in the law, provided he was injured. The wrong from which he would suffer might be as great if a non-contracting obligor was released, as though the statute discharged the promissor. The mischievous as well as illogical consequences of the doctrine that the release of stockholders is merely a change in a statutory remedy, are illustrated by Coffin v. Rich.[6] The statute under consideration in that case, by which the individual liability was fixed, was enacted prior to the acceptance of the charter under which the debt was contracted. This statute was repealed, without a clause saving the rights of those holding demands against the corporation. There was an immediate re-enactment of substantially the same law, with slight alterations. The court held that, as the repeal only affected the remedy, it was applicable to the case, and released the stockholders; but that the new statute, though it expressly undertook to hold stockholders individually liable for debts contracted during their ownership of stock could not retroact to fix this liability on a stockholder who was not so held prior to its enactment. Having assumed that the repeal of the former statute would operate retroactively, because it was a remedial law, it would not have required a very great strain upon equally sound logic to apply the new law to contracts made under the old. As applied to this particular case, this phase of the doctrine would have possessed an additional element of fairness, in the fact that the liability imposed would not have been a strange burden to the shoulders upon which it was placed. It would have been no greater than that assumed by subscription to the stock.

But this question has been taken from the State court of last resort, in which Coffin v. Rich and Cummings v. Maxwell[7] were decided, to the Supreme Court of the United States. It was there decided, after full argument, that the provisions of a railroad charter fixing this individual liability upon the stockholders of the corporation, constituted a contract between the creditors and the stockholders.[8] It was also held in the same case that viewing the change as one merely affecting the remedy, it was affected in such a manner as to impair the obligation of the contract between the corporation and the creditors, as well as that between the latter and the stockholders, and was upon that ground void.[9]

The question has been mooted as to what class of stockholders become liable under statutes of this kind; whether those owning the stock when the debt is contracted, or those who hold it when it is sought to enforce the demand. Considering the nature of the stock, and the means provided by law and custom for its facile transfer, unless there are some statutory restrictions upon the assignment of stock, so as to avoid such liability, the question can present but few difficulties. The shares must be presumed to pass burdened with all liabilities which attach to their ownership, and the burden passes with them. Therefore, the obligation would rest upon the owners of the stock when the demand is sought to be enforced.[10]

The same principle which serves to render the stockholder's individual liability binding upon him as the obligation of a contract, protects him from the imposition of such liability by a statute enacted subsequently to his subscription. Where the statute seeks to impose new burdens upon stockholders of corporations, their rights are infringed. The charter is not only a contract between the State and the corporate body; the corporation and its creditors; and between either the State, the corporation or its individual members on the

(6) 45 Me. 507.

(7) *Supra.*

(8) Hawthorne v. Calef, 2 Wall. 10; opinion by Nelson, J., p. 21, reversing s. c. 53 Me. 471.

(9) See, also, Corning v. McCullough, 1 N. Y. 47.

(10) Curtis v. Harlow, 12 Metc. 3.

one part, and the creditors of the corporation on the other; but it is also a contract between the corporation and the individual stockholder. So far as its provisions secure to the stockholders any rights or immunities, they are inviolable by subsequent legislative amendment imposing new obligations.[11] The binding force of the contract between corporation and stockholders has been recognized as sufficiently strong to prevent the taking effect of a subsequent statute, changing the original purposes of the corporation without the consent of the stockholders. And when such change consisted in consolidating the original company with another, the stockholder was thereby released from all liability on account of his subscription.[12] And it has even been held that the consent of a majority of the stockholders to the change would not render it binding upon those whose consent was withheld, for the reason that accepting such amendments to the charter was no part of the business of the corporation.[13] In Stanley v. Stanley[14] it was held that the legislature was not prevented from passing an act rendering the stockholders of existing corporations liable for its future debts, where no such liability was imposed by the charter. It is difficult to reconcile this holding with the doctrine that the rights of individual members of the corporation are secured to them by the charter. In this case the stockholder purchased his stock after the new law had gone into effect. When the subscription is made under such a statute, there is no doubt that the subscribers would thereby become liable, although the original charter contained no such provision. But with those who have already become subscribers, or who have purchased stock issued under the original charter, the case is quite different. A law which imposes upon persons who contract debts in the future new obligations is in no sense retroactive. But the stockholder does not contract the debts of the corporation. His contract is made by his subscription to the stock. He incurs only such liability as is imposed by the terms of such subscription, fixed by the charter or the general law. Where individual liability enters into the contract, it follows the stock into whosesoever hands it goes.[15] Therefore it attaches to the stock. The character the stock bears when it is issued, fixes its market value. The imposition of new burdens takes from its value in the hands of the owner who purchased it free from such attendant liability. To render it subject to liability for future debts, even in the hands of a subsequent purchaser, would be open to the same objection that would be urged against a similar change in the law taking effect upon the stock as held by the original subscriber. W.

(11) N. O., etc., R. Co. v. Harris, 27 Miss. 617; Ireland v. Palestine, etc., Trans. Co., 19 Ohio St. 369; Palestine, etc., Co. v. Worden, 13 Ohio St. 395.

(12) McCrary v. Junction R. Co., 9 Ind. 358; Marsh v. Fulton County, 10 Wall. 676, 681; Ind., etc., Turnp. Co. v. Phillips, 2 Pa. St. 184.

(13) New Orleans, etc., R. Co. v. Harris, *supra*.

(14) 26 Me. 191.

(15) Curtis v. Harlow, *supra*.

CONTRACT BY LETTER — PROPOSITION — DELAY IN ACCEPTANCE.

McCLAY v. HARVEY.

Supreme Court of Illinois.

[Filed at Ottawa, February 22, 1879.]

A, a wholesale milliner in Peoria, writes to B in Monmouth to engage the latter to do millinery work, and asks A to reply by return mail. B at once answers accepting, but the letter is not posted until two days thereafter. In the mean time A having received no reply as requested, makes efforts to engage another milliner, and failing to do so makes efforts to find B in Monmouth, but is unable to do so. B's letter of acceptance then comes to hand. A, after receiving same, leaves for Chicago and engages another milliner. B now brings suit for breach of contract. *Held*, that B having failed to accept by return mail there is no contract.

SCHOLFIELD, J., delivered the opinion of the court:

Appellant brought assumpsit against appellee in the court below on an alleged contract, whereby the latter employed the former to take charge of the millinery department of his store in Monmouth, in this State, for the season commencing in April and ending in July, in the year 1876, and to pay her therefor $15 per week. The judgment was in favor of the appellee, and the appellant now assigns numerous errors as grounds for its reversal.

In our opinion the case may be properly disposed of by the consideration of a single question. Appellant's right of recovery is based entirely upon a special contract, and unless there was such a contract, the judgment below is right, however erroous may have been the rulings under which it was obtained. After some preliminary correspondence, which is not before us, appellant, who was then residing in Peoria, received from appellee the following by mail:

MONMOUTH, Ill., March 9, 1876.

MISS L. MCCLAY, Peoria, Ill.:

I have been trying to find your address for some time, and was informed last evening that you were in Peoria. I write to inquire if you intend to work at millinery this season, and if you have made any arrangements or not. If you have not, can you take charge of my stock this season? and if we can agree, I would want you for a permanent trimmer. Please notify me by return mail and terms, and we can confer further. Yours in haste,

JOHN HARVEY.

Appellant's reply to this is not before us. She says she stated her terms in it, and thereafter appellee wrote her the following, which she also received by mail:

MONMOUTH, Ill., March 21, 1876.

MISS L. MCCLAY, Peoria, Ill.:

Your favor was received in due time and contents noted. You spoke of wages at $15 per week and fare one way. You will want to go to Chicago, I presume, and trim a week or ten days. I would like for you to trim at H. W. Wetherell's or at Keith Bros. I will give you $15 per week and pay your fare from Chicago to Monmouth and pay you the above wages for your actual time here in the house at that rate per season. I presume that the wholesale men will allow you for your time in the house. You will confer a favor by giving me your answer by return mail. Yours,

JOHN HARVEY.

Appellant says she received this in the afternoon and replied the next day by postal card, addressed to appellee at Monmouth, as follows:

PEORIA, March 23.

MR. HARVEY: Yours was promptly received, and I will go up to Chicago next week, and when my services are required you will let me know.

Very respectfully, L. MCCLAY.

Appellant did not place this in the post-office herself, but she says she gave it to a boy, who did errands about the house of her sister, and with whom she was then staying, directing him to place it in the office. The post-mark on the card, which is shown to be always placed on mail matter the same day it is put in the office, shows that the card was not mailed until the 25th of March. Appellee receiving no reply from appellant on Monday morning, March 27, went to Peoria and endeavored to engage another milliner, and failing in this, endeavored to find appellant, but was unable to do so, and then returned to Monmouth, when he received appellant's postal card, which had come to the office there during his absence. On Wednesday night of the same week appellee left Monmouth for Chicago, arriving at the last-named place on the following morning—Thursday, March 30.

Finding that appellant was neither at Keith Bros. nor at Wetherell's, he proceeded to employ another milliner, and on the same day and before leaving Chicago, wrote and mailed a letter directed to appellant's address at Peoria, notifying her of that fact, but this letter, in consequence of absence from Peoria, she did not receive for some time afterwards. The millinery season commences from the 5th to the tenth of April, and ends from the 20th of June to the 4th of July, as shown by the evidence. Appellee had not laid in his spring stock when he was corresponding with appellant, and he started to New York from Chicago for that purpose on the evening of the day on which he addressed the letter to appellant, notifying appellant of his employment of another milliner—the evening of the 30th of March. Appellant says she left Peoria for Chicago on Friday, which must have been the 31st of March. On arriving at Chicago she went to Wetherell's, and failing to get employment there, did not go to Keith Bros., but went to another house in the same line of business, where she remained some days. On the 8th of April she notified appellee by letter that she was "sufficiently informed as to the new ideas of trimming, and was ready to enter his service." Appellee replied to this, reciting the disappointment he claimed to have met with on her account, and again notifying her that he did not require her services.

If a contract was consummated between the parties, it was by the mailing of appellant's postal card on the 25th of March. Appellee's letter of the 21st, as the consummation of a contract—because it re-states the terms with some variation, though it may be but slight—requires an acceptance upon the terms thus stated. This, until unequivocally accepted, was only a mere proposition or offer. Hough v. Brown, 19 N. Y. 111.

It was said by the Lord Chancellor in Dunlop v. Higgins, 1 H. L. Cas. 387: "When an individual makes an offer by post, stipulating for, or by the nature of the business, having the right to expect an answer by return of post, the offer can only endure for a limited time, and the making of it is accompanied by an implied stipulation that the answer shall be sent by return post. If that implied stipulation is not satisfied, the person making the offer is released from it. When a person seeks to acquire a right, he is bound to act with a degree of strictness such as may not be required when he is only endeavoring to excuse himself from a liability." This is regarded as a leading case on the question of acceptance of contract by letter, and the language quoted we regard as a clear and accurate statement of the law, as applicable to the present case. It is clear here that the nature of the business demanded a prompt answer, and the words "you will confer a favor by giving me your answer by return mail," do, in effect, stipulate for an answer by return mail. Taylor v. Rennie, 35 Barb. 272.

The evidence shows that there were two daily mails between Peoria and Monmouth, one arriving at Monmouth at 11 o'clock A. M. and the other at 6 o'clock P. M., and it did not require more than one day's time between the points.

Appellee's letter to appellant, making the offer, it will be remembered bears date March 21st. Assuming the date of appellant's postal card (which she says was written on the morning after she received appellee's letter) to be correct, she received appellee's letter on the evening of the

22d. Appellee was therefore entitled to expect a reply mailed on the 23d, which he ought to have received on that day, or at furthest by the morning of the 24th. But appellant's reply was not mailed until the 25th. It does not relieve appellant of fault that she gave the postal card to a boy on the 23d to have him mail it. Her duty was not to place an answer in private hands, but in the post-office. The boy was her agent, not that of the appellee, and his negligence in mailing the postal card was her negligence. The question of whether it would not have equally well subserved appellee's object, had he treated the postal card of appellant as the consummation of a contract, is irrelevant. Appellant seeks to recover upon the strict letter of a special contract, and it is therefore incumbent on her to prove such contract. It is required of her, aswe have seen, to prove an acceptance of appellee's offer within the time to which it was limited; that is to say, by the placing in the postoffice of an answer unequivocally accepting the offer, in time for the return mail, which she did not do. Appellee was thereafter under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so.

Apellee was led by the postal card of appellant to believe that he would, when he arrived at Chicago on Thursday, find her either at Wetherell's or Keith Bros. Had he done so it was his intention to treat the contract as closed; but she was not there and this intention was not acted upon; and so is to be considered as if it had never existed.

Appellee not finding appellant at Wetherell's or Keith Bros., as she had led him to believe he would, had no reason to assume that she was in good faith acting upon the assumption that her postal card had closed the contract, and he can not therefore be held estopped from denying that it was not posted in time. In view of the lateness of the season and the danger to appellee's business from delay, of all of which appellant was aware, it can not be said that appellee acted with undue haste in engaging another milliner. The judgment is affirmed.

DICKEY, J., dissenting:

I can not concur in this decision. I think that when Harvey received on the 27th of March the acceptance of his proposition made to Miss McClay, he might have rejected it, because it was not accepted in apt time. But he had a right to waive this delay and I think he did waive it. If he did not reject this acceptance he failed to notify her that it came too late. He permitted her to act on it. He acted upon it himself. He went to Chicago to meet her there in pursuance of the contract. He could have held her upon the contract without further notice. If she was bound, he ought also to be held bound.

LIBEL—POSTAL CARD—PRIVILEGED COMMUNICATION.

ROBINSON v. JONES.

Irish High Court of Justice, Exchequer Division, May, 1879.

The defendant was a trader and the plaintiff one of his customers, and as such owed the defendant a sum of money, for the payment of which the defendant applied to him. The plaintiff, being unwell, directed his wife to write to the defendant, sending him at the same time money in part payment of the sum due. The defendant, in reply to this letter, wrote in reference to the balance, on a post-card (which was transmitted to the plaintiff through the post office) the libellous matter complained of. On demurrer to a plea of privileged communication: *Held*, that the court should take judicial notice of the nature of a post-card, and that the publication could not be taken as necessarily limited to the plaintiff. *Held*, further, that assuming the defendant to have an interest in writing the alleged libel, a communication transmitted by means of a post-card is not privileged.

Demurrer.—This was an action for libel, and from the statement of claim it appeared that the plaintiff was a medical doctor, residing and practicing in Skibbereen, in the county of Cork. The defendants were seed merchants, carrying on business at 83, Grand-parade, in the city of Cork. Before the writing and publishing of the alleged libel, the plaintiff purchased from the defendants seeds to the value of £1 8s. 1d., for the payment of which sum they applied to the plaintiff, who averred that he was then suffering from illness, and unable to attend to business. Under these circumstances, in January, 1879, his wife, in his name, wrote to the defendants, enclosing a post-office order for £1 8s. 1d., in payment of the seeds purchased, and on the 1st of February, 1879, the defendants wrote on a post-card, bearing the Cork post-mark, and which was duly delivered through the post-office, the following words constituting the alleged libel:

"Dr. ROBINSON, Skibbereen. 83 Grand-parade, Cork, February 1st, 1879.

"1877.—To amount for goods as rendered, £1 16 2

" By post-office order on account, 1 8 1

£0 8 1

"SIR—Your plea of illness for not paying this trifle is mere moonshine. We will place the matter in our solicitor's hands if we have not stamps by return, if it cost us ten times the amount.

"T. JONES & SONS."

The inuendo put upon this communication by the plaintiff was, that it meant that the plaintiff falsely pretended that he was prevented by sickness from paying the defendants' demand, and that the alleged sickness was a mere invention and sham, and that the plaintiff was an untruthful person, and unable to discharge his debts, by reason of which the plaintiff had been injured in his character, credit and reputation, and in his profession.

The statement of defense was as follows: "1. The sum for which the defendants applied to the plaintiff was £1 16s. 2d.; and they do not admit

that the plaintiff was by illness prevented from paying, as alleged in the second paragraph of the statement of claim. 2. The defendants do not admit that they, or either of them, published the alleged libel, or any part thereof, or that they, or either of them, published the same falsely or maliciously, or at all. 3. They deny that by said letter the defendants, or either of them, meant what is imputed in the fourth paragraph of the statement of claim. 4. And, as a further defense to the third and fourth paragraphs, the defendants say that the publication of the said letter was privileged, and was *bona fide* and without malice; and the defendants say that the said letter was written by the defendants to the plaintiff about a matter in which they were both interested, namely, the payment of the balance of amount claimed by the defendants from the plaintiff, as their customer, for goods supplied to his order in March, 1877, and was written in reply to a letter from the plaintiff to the defendants, enclosing a post-office order for part of the amount claimed only, and which was the only payment made by the plaintiff to the defendants for said goods, and which letter was as follows: 'Dr. Robinson would have sent the enclosed before, but he has been very ill'—and which letter the defendants received after application by them to the plaintiff for payment. Whereupon the defendants, honestly and *bona fide* believing that the plaintiff's excuse was not a reasonable and *bona fide* excuse for his neglecting to pay, and that they were entitled to claim and to be paid their demand in full, and *bona fide* intending to sue the plaintiff for the balance if not paid, and for the purpose of protecting their interests and of giving the plaintiff notice of their said intention, and *bona fide* believing that notice thereof by post-card was a reasonable mode of giving the same, wrote and published the said alleged libel, *bona fide* believing its contents to be true, *bona fide* and without malice, and not otherwise."

The plaintiff demurred to the fourth paragraph of the statement of defense, on the ground that the occasion on which the alleged libel was published was not shown to have been privileged, and on other grounds sufficient in law to sustain said demurrer.

Wright (with him *Heron, Q. C.*), in support of the demurrer.—A post-card containing libellous matter can not be privileged any more than a telegram: Williamson v. Freer, L. R. 9 C. P. 393. Post-cards were not intended to facilitate libel; Starkie on Slander, 425. The court should take judicial knowledge of their nature. The 33 and 34 Vic. cap. 79, s. 9, empowers the Postmaster General to make regulations as to post-cards. They are, therefore, cognizable in a court of law; and, if so, it is plain that there has been a publication in this case.

FITZGERALD, B.: I think there has been a pubcation, but you do not say that the defendants published to a third person. Proof of publication to the plaintiff is not sufficient to sustain an allegation of publication.

PALLES, C. B.: Upon a traverse of the publication, evidence of publication to the plaintiff will not prove a plea of publication.

Wright: Proof that the defendant knew that the clerk of the plaintiff was in the habit of opening his letters, was held to be proof that the defendant intended a letter, containing libellous matter, to come to the hands of a third party. Delacroix v. Thevenot, 2 Stark, 63. He also referred to Starkie on Slander, pp. 418, 425, 525 and 471.

W. O'Brien, Q. C., and *Wall, contra:* The alleged libel was a remonstrance of a dealer with his customer, for non-payment of a balance remaining overdue to the former, and was in connection with a letter written by the customer to the dealer, stating the customer's incapacity to pay; therefore there was, at least, an interest, and, by reason of the interest, a privilege: Fairman v. Ives, 5 B. & A. 642. There is no allegation of fact that there was any publication outside these two parties. The elements are a post-card, posted in one place and delivered in another, and as a matter of law it can not be said that of necessity its contents were published. Williamson v. Freer (*ubi sup.*) is distinguishable. That case was not decided on demurrer, and the facts were quite dissimilar from these of this case; also the grounds for justifying were different. There the libel was written in a telegram, and there is no analogy between that and a post-card, because a telegram must, of necessity, be read by the officials who transmit it.

PALLES, C. B.: The difficulty is, how am I to limit the publication to the plaintiff alone, unless I know that the nature of the publication is such that it must have been to the plaintiff, as would have been the case if, instead of a post-card, it was a sealed letter.

O'Brien, Q. C.: If there is a communication that may have been made to several, it must be so stated that it can reasonably be inferred that it was in fact so made. In Cook v. Wildes, 5 E. & B. 328, it was held that if it is admitted on the pleadings that the alleged libel was written *bona fide*, it is for the judge to rule whether the occasion is such as to create a privilege; but the question of malice is for the jury.

PALLES, C. B.: The privilege could only be extended to a communication made to a person privileged to receive it, not to a communication made to a third party. Cook v. Wildes is settled law. I think that, as between these two parties, there was privilege is clear, if the communication was made in a sealed letter sent through the post-office; in that case I would hold that there was privilege; but that is not this case.

O'Brien, Q. C.: The defendant could not have answered the statement of claim otherwise than he has done. The court should not take judicial knowledge of a post-card.

PALLES, C. B.—Then we must hold that no one could have read the communication, or that if they did, it did not amount to a publication.

O'Brien, Q.C.—The act of posting did not exceed the privilege of the occasion: Moleneux v. Clarke, 3 Q. B. D. 237; Lawless v. Anglo-Egyptian Cotton and Oil Co., L. R. 4 Q. B. 264. It does not appear that a post-card is defined by any act of Parliament; and sec. 19 of 33 & 34 Vic., cap. 79, implies that a post-card may have a cover. The

statute authorised this mode of communication by post; therefore, it could not be an improper mode of communicating with the plaintiff, and the sending of it can not deprive the defendant of his privilege. Fox v. Broderick, 14 I. C. L. R. 453.

Heron, Q.C., in reply.—The proper defense to the action would be that the defendant "did not publish * * * as alleged." Lawless v. Anglo-Egyptian Cotton Co. (*ubi sup.*) does not apply, because there the communication had to be printed, and there was no publication to the printer. It is manifest that the means of communication employed, was neither necessary nor proper.

PALLES, C.B.

The statement of claim avers a publication of defamatory matter in the following terms: "The defendant wrote and published on a post-card, bearing the Cork post-mark, and which was duly delivered through the post office, the words following." We must take this as a publication not necessarily limited to the plaintiff. I am willing to assume that the averments in the statement of defense show that the defendant had an interest in writing to the plaintiff the words complained of within the meaning of the authority of Harrison v. Bush, 5 E. & B. 344; but the publication that is to be justified is not a publication to the plaintiff, but to other persons. It is not stated that the publication is reasonable, but that the defendant believed it to be reasonable; that is apart from the question of what a post-card is. I think that we ought to take judicial notice of the nature of a post-card; and, therefore, I see no reason for holding that a communication written on a post-card is privileged. It would be a most serious thing to lay down that a person may extend the sphere of circulation of defamatory matter because he wants to save a half-penny in postage. I am, therefore, of opinion that this demurrer must be allowed with costs.

FITZGERALD, B., concurred. Demurrer allowed.

NEGOTIABLE INSTRUMENT—WARRANTY—INDORSEMENT.

CHALLIS v. McCRUM.

Supreme Court of Kansas, June, 1879.

The vendor of a bill or note, notwithstanding he transfers the same by an indorsement without recourse, impliedly warrants, by the very act of transferring, that the prior signatures to the paper are genuine, and so far at least as affected by his dealings with or relations to the paper, that it expresses upon its face the exact legal obligations of all such prior parties.

BREWER, J., delivered the opinion of the court:

On December 4, 1871, plaintiff in error loaned one Edward A. Ege $250 and took his note therefor in the sum of $265, payable to Richard Probasco or bearer, and secured by mortgage. Long after its maturity and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he endorsed it "without recourse, W. L. Challis." McCrum sued on the note. Ege pleaded usury. The plea was sustained and McCrum recovered $229.90 less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review. Can the action be sustained? Of course no action will lie on the indorsement, for by his written contract Challis expressly declined to assume the liabilities of an indorser. If sustainable at all, it must be as against him as a vendor and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is that every vendor of a bill, bond or note impliedly warrants that it is what it purports on its face to be, the legal obligation of the parties whose names appear on the instrument, and that the character of the indorsement, or the lack of an indorsement, in no manner affects this implied warranty. On the other hand, the counsel for plaintiff in error lays down the broad proposition that "there is no such thing as implied warranty in the sale of chattels," and that in the absence of express warranty the maxim *caveat emptor* is of universal application. It is clear that the character of the indorsement cuts no figure in the question. As stated, no action will lie on it. But further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer and is liable on the default of the drawee. "Without recourse" does away with this conditional liability. It leaves the indorsement simply as a transfer of title and the indorser liable only as a vendor. Yet it leaves him a vendor and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer and transferable by delivery. Hannum v. Richardson, 48 Vt. 508. Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: 1st, that there is an implied warranty of the genuineness of the signatures; and 2d, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions. Byles on Bills, 123, 125, and cases in notes; Jones v. Ryde, 5 Taunt. 488; Gurney v. Womersley, 4 Ell. & Bl. 133; Gompertz v. Bartlett, 24 Eng. Law & Eq. 156; Terry v. Bissell, 26 Conn. 23; Merriam v. Wolcott, 3 Allen, 259; Aldrich v. Jackson, 5 R. I. 218; Lobdell v. Baker, 3 Metc. 469; 1 Add. on Cont. 152; Ellis v. Wild, 6 Mass. 321; Eagle Bank v. Smith, 5 Conn. 71; Shaver v. Ehle, 16 Johns. 201; Dumont v. Williamson, 18 Ohio St. 515; 2 Parsons on Notes and Bills, chap. 2, § 2.

But in the case at bar the signature of the maker was genuine. The objection is that it was never his legal obligation to the full amount for which it purported to be. How far is there any

implied warranty in this respect? A reference to some of the leading cases will throw light upon this question.

In Thrawl v. Newell, 19 Vt. 203, it appeared that one of the makers of a note was insane. The vendor made a written assignment, in which was a description of the note, and the court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one being incapable of contracting gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it was sold." In Lobdell v. Baker, 3 Metc. 469, it appeared that the owner of a note procured the indorsement of a minor and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice Shaw, delivering the opinion of the court, says: "Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe without inquiring that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained the purchaser of such a note has a right to believe upon the faith of the security itself that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In Hannum v. Richardson, 48 Vt. 508, a note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee. In Delaware Bank v. Jarvis, 20 N. Y. 226, a usurious note was sold and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers on the note. In the opinion Mr. Justice Comstock used this language: "The authorities state the doctrine in general terms that the vendor of a chose in action, in the absence of express stipulation, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations the law may not impute to him an engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case the defendant held a promissory note which was void because he had himself taken it in violation of the statutes of usury. When he sold the note to plaintiff, and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted, so far, at least, as he had been connected with its origin." In Young v. Cole, 3 Bing. N. C. 724, certain bonds were sold as Guatemala bonds, which turned out afterwards to be lacking the requisite seal, and the vendor, though ignorant of the defect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In Gampertz v. Bartlett, 24 Eng. Law & Eq. 156, the plaintiff discounted for the defendant an unstamped bill, purporting on its face to have been a foreign bill, drawn at Sierra Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp and was valid, but being an inland bill, it required a stamp to make it a valid bill in a court of law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt, the commissioner refused to allow it against his estate because not stamped. Thereupon plaintiff, who had sold the bill and been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Lord Campbell, before whom the case had been tried, and who then held adversely to the plaintiff, said: "I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground, that the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which, on its face, it purported to be. That amounted to a warranty that it really was of that description."

In Ticonic Bank v. Smiley, 27 Me. 225, an overdue note was transferred, and with this indorsement: "Indorser not holden," yet it was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it, of which the note gave no indication and the vendor no information.

In Snyder v. Reno, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: "We have no doubt that there is an implied warranty of the transferrer that there is no defect in the instrument, as well as that the signature of the maker is genuine." See, also, Blethen v. Lovering, 58 Me. 437; Ogden v. Blydenburgh, 1 Hilt. 182; Fake v. Smith, 2 Abb. (N. Y. App.) 76; 2 Parsons on Notes and Bills, chap. 2, § 2, and cases in notes; Terry v. Bissell, 26 Conn, 23; 1 Daniels on Neg. Instruments, § 670.

In this the author thus states the law: "When the indorsement is without recourse the indorser specially declines to assume any responsibility as a party to the note or bill; but by the very act of transferring it he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse; but who is, nevertheless, liable if he draws upon a fictitious party or one without funds. And, therefore, the holder may recover against the indorser without recourse: (1) if any of the prior signatures were not genuine; or (2) if

the note was invalid between the original parties because of the want or illegality of the consideration; or if (3) any prior party was incompetent; or (4) the indorser was without title."

These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion it was as if it were no note.

This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

The suggestion of counsel that the change in the usury law by the legislation of 1872 affected the right of recovery upon the note has been already decided adversly in the case of Jenness v. Cutler, 12 Kas. 500.

Judgment will be affirmed. All the justices concurring.

MERCANTILE AGENCY — CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE.

DUNCAN v. DUN.

United States Circuit Court, Eastern District of Pennsylvania, April 26, 1879.

A mercantile agency is not liable for a loss to a subscriber acting upon information collected by its agents and communicated by them to him under his written contract with the agency, wherein it is expressly agreed that the mercantile agency shall not be responsible for any loss caused by the neglect of any of its servants, attorneys, clerks and employees. Under such a contract there is no liability on the part of the agency, even for gross negligence in the collection and communication of information by its agents.

Motion to take off non-suit.

Case, by Duncan, Hale & Co. against Dun, Barlow & Co., proprietors of the "Mercantile Agency," to recover damages for the loss suffered by the plaintiffs by reason of selling goods on credit to one James Hill upon information obtained from the mercantile agency as to his mercantile standing and credit.

The narr. alleged a contract whereby the defendants undertook to communicate to the plaintiffs, who were subscribers to the agency, information by means of which they might be enabled to know the standing, responsibility, means, and credit of persons with whom they should be connected in business. That the plaintiffs, to determine the propriety and safety of selling goods to one James Hill, applied to the defendants at their offices in Williamsport and in Philadelphia for information concerning the pecuniary responsibility of the said James Hill, and were informed that he had in his business a capital of $4000, and was the owner of real estate worth $10,000 clear of incumbrances, whereupon the plaintiffs, believing and relying upon said information, and that due care and diligence had been exercised in ascertaining the same, sold and delivered to the said Hill goods to the value of $5110.30. That the defendants were grossly negligent in ascertaining the financial responsibility, standing, and credit of the said Hill, and that on the day on which the defendants communicated the information to the plaintiffs the said Hill was not the owner of real estate clear of incumbrances and worth $10,000, but, on the contrary, was the owner of real estate, all of which had mortgages thereon which were duly recorded in the county wherein the said real estate was situated, and that the said Hill was at the date of the sale and delivery of the goods insolvent, and did not pay for the goods, whereby the plaintiffs, by reason of the gross negligence of the defendants, wholly lost the value thereof.

The defendants pleaded "not guilty," and also a special plea, averring that the information was given the plaintiff in pursuance of a written contract, whereby it was agreed that such information as might be communicated by the defendants to the plaintiffs had mainly been and should mainly be obtained and communicated by servants, clerks, attorneys, and employees appointed as sub-agents of the plaintiffs, and that the defendants should not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting and communicating the said information.

Upon the trial, before McKennan and Butler, J. J., the plaintiffs offered in evidence the written contract between the parties, which contained, *inter alia*, the following clauses:

"The said Proprietors are to communicate to us, on request, for our use in our business, as an aid to us in determining the propriety of giving credit, such information as they may possess concerning the mercantile standing and credit of Merchants, Traders, Manufacturers, etc., throughout the United States and in the Dominion of Canada. It is agreed that such information has mainly been, and shall mainly be obtained and communicated by servants, clerks, attorneys and employees, appointed as our sub-agents, in our behalf, by the said R. G. Dun & Co. The said information to be communicated by the said R. G. Dun & Co, in accordance with the following rules and stipulations, with which we, Subscribers to the Agency as aforesaid, agree to comply faithfully, to wit: * * * The said R. G. Dun & Co. shall not be responsible for any loss caused by the neglect of any of the said servants, attorneys, clerks and employees in procuring, collecting, and communicating the said information, and the actual verity or correctness of the said information is in no manner guaranteed by the said R. G. Dun & Co."

The plaintiffs also offered the following report of James Hill, communicated by the defendants by their agents at Williamsport and Philadelphia.

"James Hill, Comm. Merchant, Pittston, Pa., July 20, 1876, character, etc., good; capital in business $4,000, owns real estate worth $10,000, and clear. Credit good."

Plaintiffs then offered the records of unsatisfied mortgages given by James Hill, amounting to $8,250, and judgments against him amounting to $4,000, and rested.

Defendants asked for a nonsuit, which was

granted. Plaintiffs now moved to take it off. Upon the hearing of the motion, the court requested counsel to confine the argument solely to the question of liability for gross negligence under the contract.

David W. Sellers, for the motion. The interpretation given to the contract upon the trial as a release of all liability, even from gross negligence, is contrary to public policy. Railroad Co. v. Henderson, 1 Sm. 316; Railroad Co. v. Lockwood, 17 Wall. 368. The clause in the contract relied on by the defense can not be construed to protect them from the consequences of the gross negligence of its employees; it should be construed as covering ordinary negligence only, and as merely expressive of what the law would have been without it, viz., freedom from liability for ordinary negligence. Pasley v. Freeman, 2 Sm. Lead. Cases, *55, American note. The law frequently exempts from liability for ordinary negligence where it would not if the negligence was gross, thus recognizing a distinction which defendants claim does not exist. De Haven v. Bank, 31 Sm. 95; Bank v. Graham, 4 Norris, 91.

W. W. Montgomery, *Samuel Wagner* and *Wm. Henry Rawle*, *contra*. There is no difference in kind between ordinary and gross negligence. Though a man may not protect himself by contract against his own negligence, he may do so against that of his servants. Austin v. Manchester R. Co., 10 C. B. 454; Perkins v. N. Y. Cent. R. Co., 24 N. Y. 196; Wells v. N. Y. Cent. R. Co., Id. 181. The cases of Railroad v. Henderson and Railroad v. Lockwood (cited on the other side), hold that a *common carrier* cannot exempt himself by contract from liability for the negligence of his employees; but this is not the law as to private persons or those on whom there is no common law liability in regard to the work to be done. See Bullitt v. Baird, 27 Legal Int. 71, and comments thereon in Bradstreet v. Everson, 72 Pa. St. 124; also the telegraph cases in the different States. Passmore v. Telegraph Co., 78 Penn. St. 238. When the employment of sub-agents or substitutes is expressly provided for in the contract, the original agent will not be liable, unless negligence in the choice of the agent be proven. Story on Agency, § 201; Commercial Bank of N. O. v. Martin, 1 La. Ann. 346; Darling v. Stanwood, 14 Allen (Mass.) 504. Here the Mercantile Agency by its contract has particularly warned the plaintiff of the danger of mistakes which arise from the necessity of employing a multitude of sub-agents, and has bargained for liberty to employ them, without responsibility for their neglect. Plaintiffs being so warned, entered into the contract with their eyes open, and *ipso facto* make the employees of defendants their own agents. Moreover, they do so in terms, and thereby show clearly their intention of taking the risk of the mistakes of such employees.

BUTLER, J.

At the close of the plaintiffs' case a judgment of nonsuit was entered by direction of the court. A motion having been made to take it off, we have again looked into the testimony to ascertain whether it contains anything to support a verdict in the plaintiffs' favor; and the impression we entertained on the trial has now deepened to conviction.

The declaration charges "gross negligence in ascertaining the financial standing and responsibility of James Hill." Mr. Hill resided at Pittston, Luzerne county. The evidence shows an application by the plaintiffs to the defendants' agent at Williamsport for information respecting the financial standing of this gentleman; that they received an answer saying he had a business capital of $4,000, and real estate worth $10,000, clear of incumbrances; that the inquiry was repeated at the defendants' Philadelphia office, and a similar answer received; that the plaintiffs, relying on this information, sold goods to Mr. Hill, to a large amount, on account of which a balance of over $3000 remains unpaid, and can not be collected, Mr. Hill having failed; that the information furnished was incorrect, the real estate owned by Mr. Hill being incumbered at the time beyond its value. Upon this statement (which is sufficiently accurate and particular for the purpose in hand) it may be admitted that the plaintiffs would be entitled to recover but for the provisions contained in the second and fourth paragraphs of the contract; the former of which stipulates that the agents, in gathering information, shall be regarded as the plaintiffs' representatives; and the latter that the defendants "shall not be responsible for any loss caused by the neglect of said agents, attorneys, clerks, or employees in procuring, collecting, and communicating the said information." The language in this latter paragraph of itself is broad enough to exempt the defendants from liability for *all* negligence of such agents. The plaintiffs think it should apply only to *ordinary* negligence, and be read as if *gross* negligence was expressly excepted. For this we can find no warrant. The defendants' business required the employment of numerous agents; and it was foreseen that they might, in some instances, prove negligent and unfaithful. The defendants were particular in calling attention to this, and in guarding themselves against danger of loss therefrom; and no reason can be seen why they should be less anxious for protection against *gross*, than against common negligence, from this source. The danger from the former was as great as from the latter. By the contract the plaintiffs expressly agreed to take the risk of such loss on themselves. The authorities to which we have been referred, have, in our judgment, no application to the case. Common carriers, inn-keepers, and others engaged in the exercise of a public calling, can not thus protect themselves against the consequences of gross negligence in the agents whom they employ. This limitation of the right to contract, as parties may choose, is an exception to the general rule, and confined to the class of cases named, where the public interests are supposed to demand its application. It has no place here. The contract which these parties entered into must be enforced as they made it. It may have been unwise, but with that we have nothing to do. One or the other must bear the risk involved in depending upon agents scattered over the country, of whom neither

could know much. The plaintiffs agreed to bear it, and they must take the consequences.

That the negligence here complained of, whether gross or otherwise, is the negligence of the agents and not of the defendants personally, is undisputed and clear.

The motion is therefore refused.

WHO ARE COMMON CARRIERS—TOW BOATS.

VARBLE v. BIGLEY.

Court of Appeals of Kentucky, March Term, 1879.

1. WHO ARE COMMON CARRIERS. — A carrier of goods is not liable as a common carrier, unless he is under a legal obligation to accept the goods and carry them, and would be subject to an action for a refusal to do so. But he would not be subject to an action unless he had expressly and publicly offered to carry for all persons indifferently, or had by the conduct of his business held himself out as ready to carry for all.

2. THE OWNERS OF STEAMBOATS engaged in the business of towing are not common carriers.

Appeal from Jefferson County.

Lewis Collins and *Barrett & Noble*, for appellant; *Simrall & Bodley*, for appellee.

COFER, J., delivered the opinion of the court:

The appellants, who alleged that they were, and for many years had been, engaged in the tow-boat and jobbing business on the Ohio river and its tributaries, brought this action against the appellee to recover the agreed compensation for towing a coal-boat containing 20,000 bushels of coal from Pittsburgh, Pennsylvania, to a place called "the Pumpkin Patch," above Jeffersonville, in the State of Indiana; and also to recover for an alleged indebtedness on other accounts not necessary to be stated. The appellee denied that the coal-boat had been delivered at the place where the appellants undertook to deliver it, and alleged that, in consequence of the negligence of the appellants, the boat was sunk, and the greater part of the coal was lost, and sought, by way of counter-claim, to recover damages sustained in consequence of the sinking of the boat.

The law and facts were submitted to the court without the intervention of a jury, and the petition and counter-claim were dismissed. From that judgment the appellants appeal, and the appellee prosecutes a cross-appeal.

The parties disagreed as to the place at which, by the terms of the contract, the coal boat was to be delivered. The appellants contended that it was to be delivered at "the Pumpkin Patch," and the appellee contended that it was to be delivered at the regular landing of of Bonner & Duffey, some distance below "the Pumpkin Patch." The appellants also contended that the boat was landed and received by the consignees, and that they took possession and control of it.

On all these questions there was a direct conflict in the evidence, and without reciting it we deem it sufficient to say that there was ample evidence to authorize the finding of the court, and that this court will not enter into a minute examination and analysis of the evidence in order to determine whether there may not be a preponderance in favor of the appellants.

The judgment dismissing the petition must, therefore, be affirmed.

The court in dismissing the appellants' petition decided that they had not delivered the tow at the place agreed upon, and thus was established one of the facts necessary to sustain the counterclaim. If the boat was lost in consequence of the negligence of the appellants, there should have been a judgment agdinst them on the counterclaim; but as the court dismissed the counterclaim, and the evidence on the question of negligence was conflicting, we must presume that the court found there was not such negligence as would of itself render the appellants liable for the loss of the boat. Coleman v. Meade, 13 Bush, 358. But the appellee contends that the appellants, as owners of the tow-boat, are liable as common carriers, and this presents the only question of difficulty in the case.

Whether the owners of steamboats who undertake to tow other craft are common carriers is an open question in this State, and the authorities on the subject are in conflict. The Supreme Courts of Louisiana and North Carolina have decided that they are. Smith v. Pierce, 1 La. 349; Adams v. N. O. Steamboat Co., 11 La. 46; Watson v. Myers, 5 Jones, 174. The Supreme Courts of California and New Jersey, while deciding the cases before them upon other grounds, and waiving this question as unnecessary to the decision of the cases have intimated similar views. White v. Mary Ann, 6 Cal. 470; Ashmore v. Penn. Steam Tow Co., 4 Dutch. 180. The Supreme Courts of New York and Pennsylvania hold the opposite doctrine. Canton v. Rumney, 13 Wend. 387; Alexander v. Greene, 3 Hill, 1; Wells v. Steam Nav. Co., 2 Comst. 204; Leonard v. Hendrickson, 18 Penn. St. 40. We do not find that any of the cases have entered into a discussion of the principles governing the subject, and in this state of the authorities we feel at liberty to treat the question as *res integra*, and to decide it upon such principles as, from its nature, ought to govern in its solution.

The authorities, both elementary and judicial, recognize two kinds of classes of carriers, viz.: private carriers and common carriers. All persons who undertake, for hire, to carry the goods of another, belong to one or the other of these classes. The former class, like ordinary bailees for hire, are only liable for injury or loss of the goods entrusted to them when it results from the failure of themselves or their servants to exercise ordinary care. The latter class are liable as insurers for all injury or loss not resulting from the act of God or of the public enemy. The former are not bound to carry for any person unless they enter into a special agreement to do so. The latter are bound to carry for all who offer such goods as they are

accustomed to carry, and tender reasonable compensation for carrying them; and if they refuse to perform their obligation in this respect, they are liable to respond in damages. Private carriers are such as carry for hire and do not come within the definition of a common carrier. Angell on Carriers, sec. 46. If, then, we ascertain whether the owners of steam tow-boats come within that definition, we will have reached the conclusion sought.

"We take a common carrier to be one who offers to carry goods for any person between certain *termini*, or on a certain route, and he is bound to carry for all who tender him goods and the price of carriage, and insures the goods against all loss but that arising from the act of God or of the public enemy, and has a lien on the goods for the price of carriage. These are essentials, and though any or all of them may certainly be modified, and, as we think, may be controlled by express agreement, yet if either of these elements is wanting from the relation of the parties, without such agreement, then we say the carrier is not a common carrier, either by land or water." Parsons on Shipping and Admiralty, vol. 1, p. 245. "A common carrier differs from a private carrier in two important respects: 1. In respect to *duty*, he being obliged by law to undertake the charge of transportation, which no other person, without a special agreement, is. 2. In respect to risk. A common carrier is regarded by the law as an insurer," etc. Angell on Carriers, sec. 67. "To bring a person within the description of a common carrier, he must exercise it as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, not as a casual occupation *pro hac vice*. Story on Bailments, sec. 495. "Common carriers undertake *generally, and for all people*, indifferently, to convey goods and deliver them at a place appointed for hire, and with or without special agreement as to price." 2 Kent., 598.

In Fish v. Chapman, 2 Kelly (Ga.) 353, the question was whether Fish was a common carrier. The court said: "The undertaking (of a carrier) must be general, and for all people indifferently. The undertaking may be evidenced by the carrier's own notice, or practically by a series of acts; by his known habitual continuance in his line of business. He must thus assume to be the servant of the public —he must undertake for all people." And again: "One of the obligations of the common carrier, as we have seen, is to carry the goods of any person offering to pay his hire. With certain specific limitations, this is the rule. If he refuses to carry he is liable to be sued, and to respond in damages to the person aggreved; and this is perhaps the safest test of his character." See to the same effect Jones on Bailments, 3d Lon. ed., p. 103, note.

The liability of common carriers is upon contracts implied by law. No one can become bound by such contracts unless he has either consented to be bound in that character, or has so acted as to justify the belief that he intends to be so bound. Without actual consent or conduct from which it can be presumed, no one can become liable as a common carrier any more than upon any other character of contract. The law applicable to them is extremely rigorous. It is founded in public policy and not in abstract justice. They will not be allowed to discharge themselves from liability for goods injured or lost by showing by the most irrefragable evidence that neither they nor their servants were at fault, nor even by showing that they did all that human care, skill and vigilance could to avert the casualty. The harsh and inflexible answer is: You are common carriers, and must be held in fault, notwithstanding the fullest and most convincing evidence that you are without blame.

When a person has assumed the character of a common carrier, either by expressly offering his services to all who will hire him, or by so conducting his business as to justify the belief on the part of the public that he means to become the servant of the public, and to carry for all, he may be safely presumed to have intended to assume the liabilities of a common carrier, for he was bound to know that the law would so charge him, and knowing, must have intended it. But in order to impress upon him the character, and impose upon him the liabilities of a common carrier, his conduct must amount to a public offer to carry for all who tender him such goods as he is accustomed to carry. When this is the case, then those who tender him goods to carry accept his offer, and he becomes bound to carry them; and if he refuse to do so, "having convenience," and being tendered satisfaction for the carriage, he is liable to an action, unless he has reasonable excuse for his refusal. Jackson v. Rogers, 2 Show. 327; Riley v. Horne, 5 Bing. 217; 1 Ld. Rayd. 646; 2 Kent. 598.

This duty is inseparable from the character of a common carrier. By his conduct he induces the public to rely upon him to do their carrying. He is continually offering his services, and when his offer is accepted he has no right to refuse performance. But when he has not held himself out in such way as to amount to an offer to carry for all shippers, no one has right to depend upon him, or to demand that, as matter of duty, he shall carry his goods, and he may refuse, though he has room and to spare, and his charge for carriage be tendered. If he is bound to carry for all who offer, then he is a common—a public—carrier, and whatever he receives as a common carrier he is bound for in that character. The duty to receive, and the liability to account, are correlative, and a carrier must receive and transport in the same character. If he receives as a private carrier, he carries and is liable in that character, and that only; he is bound according to the tenor of his contract. If he receives as a common carrier, he carries and is liable in that character, unless he has contracted for a modified liability.

Our conclusion, then, is, that a carrier of goods is not liable as a common carrier, unless he was under a legal obligation to accept the goods and carry them, and would have been liable to an action if, without reasonable excuse, he had refused to receive them; and that he would not be liable to such an action unless he had expressly and publicly offered to carry for all per-

sons indifferently, or had, by his conduct and the manner of conducting his business, held himself out as ready to carry for all.

We are aware that the rule has not always, and perhaps not generally, been thus restricted. But as we have already said, the law applicable to common carriers is peculiarly rigorous, and it ought not to be extended to persons who have not expressly assumed that character, or by their conduct and from the nature of their business justified the belief on the part of the public that they intended to assume it. As said by Chief Justice Marshall in Boyce v. Anderson, 2 Peters, 150, "though to the extent to which the law has been applied, we admit its necessity and its policy, we do not think it ought to be carried further, or applied to new cases."

Tested by the principles we have laid down, it is clear the appellants are not chargeable as common carriers. They are not shown to have held themselves out to the public as ready to tow craft for all who might seek their services. They are engaged in a business which, in its nature, is not such as to entitle the public to suppose they would tow for all who might desire to hire them. They are not shown to have operated upon a definite route, or between established *termini*. They operate on the Ohio and its tributaries, and from the facts in the case there is no reason to suppose that the public looked to them as bound to carry without a special agreement, or that they ever intended to undertake to do so, or to carry for any one without a special contract. They made such a contract with the appellee, and on the facts of the particular case, as well as from the nature of their business, "towing and jobbing," they should be deemed private, and not common carriers, and consequently they were only liable in case they failed to exercise ordinary care and skill, considering the nature of their business; and the court having found that they did not fail in this respect, the judgment must be affirmed.

This conclusion is not inconsistent with the Louisiana cases, quoted in the beginning of this opinion. From the facts stated in the opinion in the first of those cases, it appears that boats engaged in towing vessels to and from New Orleans, and the mouth of the Mississippi, "are publicly offered to all persons who choose to hire them." This made them common carriers. Having publicly offered their services to all, all had a right to rely upon them, and to demand their services when desired, and the owners of such boats would be liable to an action if they refused, without reasonable excuse, to tow when applied to for the purpose.

In the North Carolina case no reasons are given for the decision, and no authorities are cited in support of it, and it stands alone, so far as our researches have extended, in holding that the owners of steamboats are common carriers from the simple fact that they are accustomed to engage in towing other craft.

Judgment affirmed on the original and cross appeal.

NOTES OF RECENT CASES IN THE UNITED STATES CIRCUIT AND DISTRICT COURTS.

LEVY OF EXECUTION WHEN SUFFICIENT—SALE.—1. Unless required by statute, a levy or seizure of real property for the purpose of sale to satisfy a debt or tax may be made without going upon the premises, by making a memorandum upon the warrant of the description of the premises for the purpose of a levy. Catlin v. Jackson, 8 Johns. 546; Armstrong v. Reckey, 2 N. B. R. 475. 2. A deputy collector of internal revenue to whom a warrant was directed for the collection of a delinquent tax due from Joseph H., levied upon 330 acres of land belonging to the said Joseph H., when said tax became due, by entering upon said warrant a correct description of the premises by metes and bounds, but at the same time incorrectly stated therein that they were in the occupation of John H. who lived over two miles distant from the premises, and afterwards offered the premises upon which said John H. lived for sale upon the erroneous assumption that they were the premises of Joseph H. upon which he had levied as above, and there being no bidders declared the same purchased for the United States for the amount of tax, interest thereon and charges. *Held*, that there was no sale of the premises levied upon as the property of Joseph H., and that the United States took nothing by the subsequent conveyance to it from the collector.—*United States v. Hess.* United States Circuit Court, District of Oregon. Opinion by DEADY, J.

OFFICIAL BONDS—PRESUMPTION.—1. In the absence of any statute upon the subject, a bond voluntarily given to the United States to secure the payment of a debt or the performance of official duty is valid. 2. But where a statute prescribes the penalty and conditions of a bond, one given in a greater penalty or upon substantially other or different conditions is so far illegal and void. 3. An Indian agent appointed for Oregon under § 4 of the act of June 5, 1850 (9 Stat. 437), was required to give bond in the penal sum of $2,000, as provided in § 4 of the act of June 30, 1834 (4 Stat. 735); and he was also a person "charged or trusted" with the disbursement or application of money or property on account of the Indian department, within the purview of § 8 of said act of 1834, and therefore might be required by the President to give a bond in a larger sum than $2,000 for the performance of his official duties. 4. The law presumes that official duty has been duly performed, and therefore where the Indian department took a bond from an Indian agent in Oregon in a larger amount than $2,000, the presumption of law is that the increase in the penalty was required by the executive, and the bond is valid until the contrary appears.—*United States v. Humason.* United States Circuit Court, District of Oregon. Opinion by DEADY, J.

INJUNCTION—CONTEMPT.—Certain parties having been injoined from grading a street until the hearing of the cause, or the further order of the court, subsequently proceeded to grade the street under authority of a city ordinance, passed after the issuing of the injunction, without first presenting the ordinance to the court and procuring a dissolution or modification of the injunction. *Held*, 1. That they were guilty of contempt. 2. That a party can only be relieved from the operation of an injunction, absolutely prohibiting the performance of a specific act, by the court granting the injunction.—*Muller v. Henry.* United States Circuit Court, District of California. Opinion by SAWYER, J. 3 Pac. Coast L. J. 206.

JURISDICTION — BILL TO IMPEACH DECREE FOR FRAUD.—1. In a proper case, a decree may be impeached collaterally in another court, but where a bill is brought to set aside and declare void a decree ren-

dered in this court, whether on the ground of fraud or otherwise, this court being the one in which the decree was rendered, is the only tribunal which can properly take cognizance of such a bill. 2. In such a case the question of jurisdiction does not depend upon the fact of citizenship of the parties; nor can the bill be regarded as a bill of review, and as such required to be brought within two years after decree. It may be said to be the outgrowth of the original suit, an incident of it, from jurisdiction over which flows the jurisdiction to entertain this bill.—*Osborn v. Michigan Air Line Co.* United States Circuit Court, Eastern District of Michigan. Opinion by WITHEY, J. 11 Ch. L. N. 367.

ABSTRACTS OF RECENT DECISIONS.

SUPREME COURT OF NORTH CAROLINA.

June Term, 1879.

NEGLIGENCE — DEFECT IN ROLLING STOCK OF RAILROAD—MASTER AND SERVANT. — Where there was a defect in a connecting rod which was unknown to the plaintiff, a brakeman on a railroad, but which his employers could have ascertained by having the machinery inspected, and they did not cause it to be inspected, and under the strain the rod broke and caused an injury to the plaintiff while in the discharge of his duties as brakesman, the railroad company is responsible. Opinion by SMITH, C. J.—*Johnson v. Richmond & Danville R. Co.*

EVIDENCE OF ACCOMPLICE FOR STATE DOES NOT BAR INDICTMENT.—If an accomplice gives evidence for the State, that fact can not be pleaded in bar to an indictment against such accomplice, nor can it be availed of as a defense on the trial, though it may be made the ground of a motion to delay the trial to give an opportunity to apply for executive clemency. If the evidence was given in consequence of assurances from the solicitor, its only effect can be to influence him to enter a *nolle prosequi* under a proper sense of official duty. Opinion by SMITH, C. J.—*State v. Lyon.*

CRIMINAL PROCEDURE—IMPROPER JUROR IMPANNELLED— POWER OF COURT TO ORDER MISTRIAL. —On a trial for murder the agent of the defendant, with his knowledge and procurement, succeeded in getting upon the jury with a view to procure an acquital, a man who falsely took the oath that "he had not previously formed or expressed the opinion that the prisoner was not guilty," and who had previously, with the prisoner's knowledge, been assisting in his defense. On motion made, after the empanneling of the jury, the judge ordered a mistrial. *Held*, that the facts found by the court are conclusive, and only the conclusions of law are reviewable. If a judge should sit on the bench and allow such a fraud as is disclosed by the facts found in this case, trial by jury would be a farce and the administration of justice a mere mockery. The mistrial was properly ordered and the prisoner must be held for another trial. Opinion by ASHE, J.—*State v. Bell.*

RULE OF LIABILITY OF RAILROADS FOR KILLING STOCK.—If the owner permits his cattle to stray off and get upon the track and they are killed or hurt, the company is not liable, unless the company were carelessly running the train, or could by the exercise of proper care, after the animals were discovered, have avoided or prevented the injury. The company is not required to abate the usual and safe speed of their trains lest there may be cattle on the road, which may be killed or injured; and if a proper look out is kept up and all reasonable efforts made, when the obstruction is seen, to avoid an accident, the company is exempt from responsibility, and the injury is ascribed to the contributory negligence of the owner of the stock in permitting them to roam about and get on the track. When all the facts and circumstances of the accident are shown, the law itself will raise, or refuse to raise, the inference of neglect upon which the liability of the company depends. The force of the presumption raised by the statute (Batt. Rev. ch. 16, sec. 11) only applies when the facts are unknown, or when from the testimony they are uncertain. In such cases the statute turns the scale but not when all the facts are established. Negligence is a question of law to be decided by the court upon admitted facts. Opinion by SMITH, C. J.—*Doggett v. Richmond & Danville R. Co.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

[Filed June, 1879.]

CORPORATION— LEASE — LIARILITY FOR TORT.— A horse railroad corporation which by the consent of the legislature, has leased its railroad, franchise and appurtenances to an individual, and contracted with him for the operation of said railroad is, independently of the statute provision to that effect in its charter, liable to a passenger injured during the term of the lease and while the lessee was in control and possession of said road, by the negligence of servants employed by and for the lessee. Opinion by SOULE, J.—*Quested v. Newburyport and Amesbury Horse R. Co.*

TOWN — DEFECTIVE HIGHWAY — MASTER AND SERVANT.—The defendant town contracted with F to light and take care of all its street lamps, who engaged the father of the plaintiff, a minor, to light and have the care of a certain number, and paid him for his services; and the plaintiff, who did the work of lighting and putting out the lights for his father while the latter was so hired by F, was injured, while engaged in said work, by a defect in the sidewalk, to wit: a board over which he fell. The defendant contended that the plaintiff was their servant, and that the injury was caused by the neglect of some fellow-servant in omitting to remove the board. *Held*, that such relation did not exist. Kimball v. Coleman, 103 Mass. 194; Johnson v. Boston, 118 Mass. 114. Opinion by AMES, J.—*Eaton v. Woburn.*

PROMISSORY NOTE — WAIVER OF DEMAND AND NOTICE—SET-OFF. — Action on a promissory note, payable on demand, dated in April 1, 1877, which was overdue at the time of the indorsement by the payee, Perry, to the plaintiff. The defendant in set-off relied on a claim against Perry, and produced a note of other parties secured by a mortgage of personal property dated in 1870, payable in three months after demand to the order of Perry, and by him indorsed to the defendant at the time when the note in suit was given, as the consideration for the same and for money then paid by the defendant to Perry. The mortgage was also assigned to the defendant at the same time. There was evidence that, in the following May, the defendant, having been told that the note and mortgage were worthless, so informed Perry and told him that he should hold him as indorser on the note, to which Perry assented, and said he would take the mortgaged property, sell it, and take care of the note, and would not hold the defendant liable on the note in suit until he had paid the mortgage note. In pursuance of this agreement, Perry took possession of

the property but failed to sell it, or to pay the mortgage note. He stored the property for two years, during which time he often told the defendant that he would sell it, take care of the mortgage note and not hold him liable on the note in suit till he did. The note last named was then in Perry's hands and remained his property until 1874, when it was indorsed to the plaintiff. It was assumed by both parties that the mortgage note became due before the note given by the defendant was transferred to the plaintiff and while Perry had possession of the mortgaged property. The defendant claimed that there was evidence in the case which would justify the jury in finding that Perry had waived demand and notice, and if so that then the defendant's right of set-off would be established. The judge rejected the evidence, ruled against the evidence on the pleadings, and upon the evidence admitted directed a verdict for the plaintiff. *Held*, that this ruling was erroneous. The defendant upon this evidence had the right to go to the jury on the question of waiver. Gove v. Vining, 7 Met. 212: Third Nat. Bank, etc. v. Ashworth, 105 Mass. 503. Proof of waiver of demand and notice is sufficient to support the allegation of demand and notice. Taunton Bank v. Richardson, 5 Pick. 435; Harrison v. Bailey, 99 Mass. 720. Opinion by COLT, J.—*Armstrong v, Chadwick.*

SUPREME COURT OF PENNSYLVANIA.

May-June, 1879.

PARTNERSHIP — POWER OF PARTNER TO BIND HIS CO-PARTNER—ADMISSIONS—RATIFICATION.—J T, a member of the firm of T & F. whose business was the laying of wooden pavement, accepted a draft drawn in favor of the plaintiffs, signing his name "J T for T & F." There was evidence that F, the other partner, had been shown the draft and made offers as to its payment. *Held*, that this was sufficient evidence of a ratification by F to send the case to the jury. *Held, further*, that evidence tending inferentially to disprove the alleged admission of liability by F (*e. g.*, that the firm received no consideration) was inadmissible Opinion PER CURIAM.—*Filbert v. Bickel.* 7 W. N. 217.

FRAUD — ADMINISTRATOR'S PURCHASE AT HIS OWN SALE, WHEN VOID—TENDER. — Where an administrator at the sale of his decedent's estate discouraged bidders with the view of procuring the property himself at a low price, and he purchased it through a third party, though not at a gross undervalue, the sale is fraudulent and void without regard to the price the property actually brought, and the owners of such property are entitled to recover in ejectment against such purchaser without a tender of the purchase-money. Opinion PER CURIAM.—*Mayer v. Senyard.* 7 W. N. 224.

MUTUAL INSURANCE COMPANY—SURRENDER—LIABILITY.—A mutual insurance company is relieved from liability for loss occasioned by fire, after a voluntary surrender and acceptance of the policy, and payment of assessments then due. No formal cancellation of the same, or erasure of the name of the insured from the books of the company is necessary, notwithstanding the by-laws provided that the liability of the members should continue until such cancellation and erasure should have been made. Opinion by GORDON, J.—*Farmer's Mut. Ins. Co. v. Wenger.* 7 W. N. 191.

FIXTURES—GAS FIXTURES AND HEATERS — EVIDENCE OF PAROL AGREEMENT — DURESS.—1. Gas fixtures and heaters, though appurtenant to the house, are personal property. 2. Parol evidence is admissible to show a collateral agreement between the vendor and purchaser of a house that the gas fixtures and heaters should pass with the house to the purchaser of the latter under a written agreement. 3. The plaintiff and defendant had agreed for the sale of a house; before the time for delivery of possession the plaintiff claimed that he had the right to remove the gas fixtures and heater; the defendant denied this; he afterwards, however, gave the plaintiff his note for the amount agreed on as their value, making it non-negotiable, in order that the matter might be thereafter contested. In an action upon the note: *Held*, that there was no evidence of either duress or fraud in obtaining the note, and that the transaction was nothing more than a fair compromise of a disputed question, which the defendants would not be allowed to gainsay. Opinion by GORDON, J.—*Heysham v. Dettre.* 7 W. N. 207.

POLICE POWER OF CITY — BUILDING LAWS—WHAT CONSTITUTES A "NEW BUILDING."—A back building was raised one story, changed, as to two of its walls, from frame to brick, and so altered internally by staircases, ranges, partitions and doors as to make practically four separate dwelling-houses, each constituting a cheap tenement house for a family. *Held* (sustaining the decision of the court below), that the alterations constituted a "new building" within the meaning of the act of April 21, 1855, requiring that all new buildings within the city of Philadelphia shall front upon a street of not less than twenty feet in width, and shall have an open space attached to them of twelve feet square. But *held, further* (reversing the decree of the court below), that the owner can not be restricted in his right to lease a part of his building, or to permit it to be so occupied. "The object of the act was to secure and protect health and life by furnishing each family with a sufficient quantity of light and pure air, and with a reasonable facility for escape in case of fire. It should be construed so as to give due effect to its wise sanitary provisions. The power of the court under this act is limited to restraining the continuance of the work, and to ordering the removal or change of so much of the building as may come within the prohibition of the law, but does not extend to controlling the use and enjoyment of it." Opinion by MERCUR, J.—*Brice's Appeal.* 7 W. N. 239.

VENDOR AND VENDEE—PERSONAL LIABILITY OF VENDEE FOR MORTGAGE DEBT.—1. The mere fact that the amount of a mortgage upon land has been retained out of the nominal purchase-money, as recited in the deed, is not sufficient to create a personal liability for the mortgage debt on the part of the vendee. 2. A. purchased land, upon which was a mortage of $11,000 for $3,000; the consideration expressed in the deed was $14,000. Accompanying the deed was a separate and contemporaneous covenant by the vendor that the mortgage debt should not be called in for five years if the interest were punctually paid; the agreement recited that the vendor had that day conveyed, "for the sum of $3.000, a lot of land subject to the payment of a mortgage of $11,000." The mortgage was sued out, and a balance of the debt remained unpaid, Upon the presentation of a claim for the balance against the estate of the vendee, the auditor found as a fact that payment of the mortgage debt had not been personally assumed. *Held*, that the claim was properly disallowed. Opinion PER CURIAM.—*Davis' Appeal*, 7 W. N, 237.

EXECUTION—SHERIFF'S SALE—FAILURE TO PAY PURCHASE-MONEY — RESALE — MEASURE OF DAMAGES.—1. A. paid $50 on his accepted bid of $1,100 for real estate at sheriff's sale, under the following condi-

tions: "The balance of the purchase-money must be paid to the sheriff at his office, within ten days from the time of sale, without any demand being made by the sheriff therefor; otherwise the property may be sold again at the expense and risk of the person to whom it is struck off, who, in case of any deficiency at such resale, shall make good the same." A. having failed to pay the balance of the purchase-money, the property was resold to B. for $1,600. He also failed to comply with the conditions, and at a third sale C. purchased at $100, and received his deed. In a suit by the sheriff against A.: *Held*, that he was entitled to recover the difference between the purchase-money paid by C. and the amount of A.'s bid, less $50 paid at the time of the first sale. 2. A purchaser at sheriff's sale who fails to pay the purchase-money within the time limited by the terms of sale, is not relieved from his liability to the sheriff by the fact that there is a second sale, at which the property is struck off at an increased price, unless the purchaser at the second sale pays in his purchase-money Opinion PER CURIAM.—*Schœning v. Leeds*, 7 W. N. 243.

NEGLIGENCE—DUTY OF CARRIERS OF PASSENGERS AND PASSENGERS—BURDEN OF PROOF.—1. It is the duty of a railroad company to provide safe and reasonably convenient means of ingress and egress to and from its cars; it is the duty of passengers to use the means thus provided with reasonable circumspection and care. 2. The general rule is that a party who alleges negligence as the basis of a claim for damages is bound to prove the fact alleged, and the extent of the injury, if more than nominal damages are claimed; but in some cases slight proof only is required to justify a presumption of negligence. 3. But if a passenger, seated in a railroad car, is injured in a collision, or by the overthrow of the car, the breaking of a wheel, axle, or other part of the machinery, he is not required to do more in the first instance than to prove the fact, and show the nature and extent of the injury. A *prima facie* case is thus made out, and the *onus* is cast upon the carriers to disprove negligence. 4. While in the act of alighting from the lower step of a railroad car to the ground, a passenger was injured by fracture of the knee-cap, the result of the apparent strain of stepping down the distance variously estimated at from eighteen to twenty-nine inches. The train had reached its destination, and the passenger was assisted in alighting by her husband on a spot where many thousand passengers had previously done so in safety. *Held* (reversing the judgment of the court below), that the facts did not raise the presumption, *prima facie*, of negligence in the defendant, and throw on it the burden of disproving negligence; but that the case was governed by the general rule that he who alleges negligence as the basis of a claim for damages is bound to prove it affirmatively. Opinion by STERRETT, J. MERCUR and GORDON, J.J., dissent. SHARSWOOD, C. J., and PAXSON and WOODWARD, J.J., concurred in judgment, but were of the opinion that there was not sufficient in the facts disclosed by the testimony to justify their submission to the jury.—*Delaware, etc., R. Co. v. Napheys*, 7 W. N. 233.

SUPREME COURT OF ILLINOIS.

[Filed at Springfield June 20, 1879.]

PRACTICE—JUDGMENT FOR TOO LARGE AMOUNT—REMITTITUR—COSTS TO BE TAXED AGAINST REMITTING PARTY.—This is an appeal from the appellate court of the third district. The suit was upon a promissory note, and judgment was rendered in the circuit court for $1,195, when in fact the evidence showed that the amount of the judgment should have been only for $1,185. In the appellate court a remittitur was entered for $10, and thereupon the judgment of the circuit court was affirmed for the remainder, and the cost of the appeal were taxed to the appellant in that court, who is also the appellant here. SCHOLFIELD, J., says: "There can, on the authority of decisions of this court, be no question but that the judgment was erroneous. We have held, where a judgment is taken for too large an amount in the court below, and the excess is cured by a remittitur in this court, the party entering the remittitur must pay all costs incurred in this court up to the time of entering the remittitur. See 72 Ill. 619; 79 Ill. 351; 78 Ill. 611. This, however, affects only so much of the judgment as relates to the question of the costs of the appeal in the appellate court. The balance of the judgment is correct." Affirmed in part and reversed in part.—*Snell v. Warner*.

MORTGAGE—INACCURATE DESCRIPTION IN DEED—EVIDENCE OFFERED TO LOCATE THE LAND—ORAL EVIDENCE.—The bill in this case was to foreclose a mortgage made by Abram Cornwell, since deceased, his wife joining with him, in premises described as follows: "A certain tract or parcel of land containing about seventy acres, being a part of the E. 1-2 S. E. 1-4 sec. 17, 721 N. R., or however else the same may be bounded or described," to complainant to secure the promissory note of Cornwell. SCOTT, J., says: "Although the bill asks that the mortgage may be reformed and corrected so as to show a more accurate and definite description of the premises embraced in the mortgage, it is conceded that it can not be reformed as against the wife of the mortgagor. We do not understand that it was the purpose in introducing testimony to have the mortgage reformed, but it was simply to aid in locating the land by the description contained in the mortgage, and that is allowed under the decision in Colcord v. Alexander, 67 Ill. 584. That is not in fact reforming the mortgage as to the wife of the mortgagor or any one else. It was attempted to prove that the mortgagor owned the whole of the tract described, and that prior to the execution of the mortgage he had conveyed a part of the same, which deducted would leave about 'seventy acres.' But the testimony offered to prove that fact, we think was not the best evidence admissible for that purpose. The only evidence on that question was the oral testimony of H and the abstract of title made by him. The witness, as we understand the record, was permitted to state what the record showed. That was not allowable under any rule of evidence with which we are familiar. The deed itself or the record would show what land was in fact conveyed. On account of the admission of improper evidence the decree is reversed."—*Cornwell v. Cornwell*.

SUBSCRIPTION—LIABILITY FOR WHERE NO PAYEE EXPRESSED—CONDITION—BONDS ISSUED TO BUILD COURT HOUSE.—This was an action of assumpsit brought by the City of Virginia against Robert Hall. The declaration contains the common counts. On the trial plaintiff recovered a judgment. Defendant appeals, and the case comes up here on an agreed statement of facts, viz.: 1st, that the defendant signed the following: "We, the undersigned, agree to pay the amount set opposite our names, for the purpose of building a house, in the public square, in the town of Virginia. Ill., to be donated to Cass county for county purposes, in the event of the removal of the county seat from Beardstown to Virginia;" 2, that a building was built in the public square after said subscription was signed, and that said building was leased by the City of Virginia to Cass county for a period of ninety-nine years for court-house purposes; 3, said building

was built at the expense of said city of Virginia, including moneys collected in said subscription; 4, that the defendant never paid any portion of this subscription; 5, that the city of Virginia issued bonds to erect said buildings and that said bonds are now outstanding; 6, that the building is used as a court house and that the county seat was removed to Virginia; 7, that the city of Virginia expended money in building said court house in part upon the faith of said subscription of defendant." The first ground relied upon by defendant is that the subscription paper contains no payee. CRAIG, C. J., says: "We understand the doctrine is settled in this State that the party who advances money as did the city of Virginia in this case on the faith of the subscription becomes the proper promisee or payee. See 43 Ill. 356. It is also urged that the court house has been leased to Cass county, and not donated, and hence the conditions upon which defendant subscribed not having been complied with the money is not due. The defendant's agreement was to pay the money for the purpose of building a house to be donated to Cass county, not on condition the donation was made; besides a leasing for ninety-nine years when no rent is required to be paid may be regarded as a substantial compliance with the specification. It is next urged that the city of Virginia had no right to issue bonds and erect the building. It is doubtless true a city or incorporated town can not incur a debt or liability for other than corporate purposes, but the question whether the city of Virginia is legally liable for the payment of the bonds it has issued, can not be raised by the defendant in this action. We are not aware of any authority which would sanction the right of this defendant when sued upon a debt of his own contracting interposing a defense of that character. The judgment of the court below was for the amount of subscription and interest. The latter was erroneous, as there is nothing in the record upon which a judgment for interest can be based." Reversed.—*Hall v. City of Virginia.*

PRACTICE IN SUPREME COUCT — APPEAL FROM APPELLATE COURT FINDING FACTS— DETERMINATION OF QUESTIONS OF LAW AND NOT OF FACT.— The appellate court having determined that the evidence preserved in the record sustains the finding of the jury in this case, we must under the statute consider the verdict conclusive of the facts. Regarding the facts as settled, we can only look to ascertain whether the court erred in its rulings and in giving or refusing instructions. This is the practice established by the act of 1877. The 89th section of that act expressly limits the power of this court on appeal or error to the determination of questions of law, and prohibits the assignment of error which shall call in question the determination of the inferior or appellate courts upon controverted questions of fact, excepting in the cases enumerated in the preceding section. The cases referred to in that section are criminal cases and cases involving a franchise, or a freehold, or the validity of a statute. This case does not fall within either of the enumerated classes, and it must therefore be governed by the 89th section of the act. This legislation has restored the practice as it was before the statute authorized the assignment of error on the verdict of the jury. It takes from this court the consideration of facts, unless it be to determine whether the law has been properly applied to the facts. The finding of the facts by the appellate court must be considered by us as conclusive. Where the evidence is returned to us in a bill of exceptions, we may no doubt look into it for the purpose only of determining whether instructions are properly given, modified or refused. But when the appellate court certifies that there was evidence tending to prove a particular controverted point, we can determine as accurately whether the law has been properly applied as when all of the evidence is brought to this court in the transcript. And such a certificate is greatly preferable, as it does not incumber the record and reduces the expense of litigation very largely. Thus it will be seen that it is wholly unnecessary in a case of this character to embody the evidence in the transcript brought before us. Where an instruction is given we will presume, unless the certificate of the appellate court is to the contrary, that there was evidence upon which to base it. And when an instruction is refused we will presume that the facts did not require it, unless the certificate shows there was evidence upon which to base it. When the certificate states there was evidence tending to prove an issue of fact, we can readily determine whether an instruction is properly given, modified or refused. And the appellate court can readily certify that there was evidence upon which to base the instruction, or if not which were given without such evidence. Or the certificate can state that the evidence tended to prove specified facts from which legal propositions can be raised on the instructions. When evidence has been offered and admitted or rejected, the certificate with the pleadings will readily disclose the question as to whether the ruling of the court was correct. In such a case it is unnecessary to present all of the evidence, and to do so would be improper practice." Opinion by WALKER, J.— *Wabash R. Co. v. Henks.*

BOOK NOTICES.

[NEW BOOKS RECEIVED. — Missouri Appeal Reports. Vol. 5: F. H. Thomas & Co., St. Louis; Jacob's Fisher's Digest. Vol. 1: Geo. S. Diossy, New York; United States Digest. Vol. 9: Little, Brown & Co., Boston; Jones on Mortgages, 2d Edition; Houghton, Osgood & Co., Boston; Rogers' Law of Hotel Life: Houghton, Osgood & Co., Boston.]

REPORTS OF THE DECISIONS OF THE APPELLATE COURTS OF THE STATE OF ILLINOIS. By JAMES B. BRADWELL. Vol. III. Chicago: The Legal News Co. 1879.

The third volume of this series contains a portion of the opinions of the first district of the March term, 1879: all the remaining of the second district up to the June term of this year, and of the third district up to the May term, 1879; and all the opinions of the fourth district from the organization of the court up to the July term, 1879.

Nearly 150 cases are here reported, and among them we find the following rulings of general interest: In an action against a railroad for killing stock, the bad condition of its fences at other places than where the stock got upon the track is irrelevant.—*Chicago, etc. R. Co. v. Fanelly.* The defendant's bar tender sold liquor to B, and an altercation ensuing, threw a glass at B, which missed him and injured plaintiff: *Held*, that the injury was not the proximate consequence of the sale of the liquor.—*Lueken v. People.* The offer by an association of a purse of $600 divided into four parts, to be given to the winning horse of a race to be run under the rules of the association, is not within the statute against gaming. — *Wilson v. Conlin.* To render the owner of a vicious dog liable, it is not necessary that he has previously bitten others; it is enough to show that there was within the owner's knowledge a probability that he might do so. — *Flansburg v. Basin.* When damages for loss of profits may be recovered in actions of tort.—*Illinois, etc. R. Co. v. Decker.* The personal liability of directors and officers of corporations for indebtedness exceeding the capital stock, can be enforced only by the creditors as a whole, and not by an individual creditor for the amount of his debt. *Buchanan v. Barlow Iron Co.* An attorney ac-

cepting employment in a case, can not abandon it because fees due to him in another case have not been paid. *Cairo, etc., R. Co. v. Koerner. Scire facias* to revive a judgment is an "action" within the meaning of that word in the statute of limitations. *Gibbons v. Goodrich.* To sustain an action for separate maintenance, two facts must concur—the complainant must be living apart from her husband, and must be so living without fault on her part. *Jenkins v. Jenkins.* Punitive damages may be allowed in actions for slander of title. *Van Tuyl v. Riner.* The volume is excellently printed, and the paper and binding are both good. The work of the reporter is fully up to the standard of the previous volumes.

QUERIES AND ANSWERS.

QUERIES.

20. MORTGAGE—FORECLOSURE—JUDGMENT.—A, in January, '76, executes a mortgage to B on his lot for $1,000. B, in February, '77, forecloses and obtains judgment of foreclosure. A, in March, '77, sells his property to C, warranting, except as to the judgment and foreclosure of B on said property. C and wife execute a mortgage in April, '77, on the same property to D for $600, to secure a joint note given by B and C to D. In May, '78, D forecloses and obtains judgment against B and C and decree of foreclosure. In June, '78, B assigns the decree of foreclosure he obtained against said property in February, '77, to E. In July, '78, D sells the property in question, by virtue of the decree he obtained under special execution against B and C. Query: What are E's rights under the decree of foreclosure and judgment assigned to him.

A. W. E.

ANSWERS.

No. 16.

[9 Cent. L. J. 120.]

"Not only is a surety who pays his principal's debt entitled to a transfer of securities held by the creditor, but he is in all respects entitled to all the equities which the creditor could have enforced." De Colyar on Guaranty and Suretyship, by J. A. Morgan, p. 330. See 23 Ohio St. 483, for general discussion of rights of surety.

KANSAS.

No. 35.

[8 Cent. L. J. 508.]

The question of law submitted in this query is a new one to the Missouri bar. In answer thereto, I will give the action of the Circuit Court of Grundy County, at its August term, 1879, together with a brief statement of the case. The members of the bar that heard the case tried, believe the court declared the law correctly. S. purchased a horse from C., for which he agreed to pay $60 in work. S. built a house and barn for C., which amounted to $169. During the progress of the work C. paid S. various items of produce, which, together with the horse, amounted to $184. C. brought suit before a justice of the peace on the account, and recovered a *general* judgment for $15 with costs. A *general* execution was issued thereon, under which the officer seized and sold the horse. S. claimed all his property as exempt from execution. S. sued the officer on his bond in the circuit court, and at the trial it was admitted that the horse was exempt, unless he could be held under the provisions of the act of March 31st, 1874. See Mo. Sess. Acts of 1874, p. 118. The court gave the following instruction: "The finding must be for the plaintiff, S., notwithstanding the court, sitting as a jury, may believe that the horse in controversy was sold by C. to the plaintiff; unless the court further finds from the evidence that the judgment upon which this execution issued was rendered alone for the balance of the purchase price of said horse." R. A. D.

NOTES.

THE death of Mr. Proffatt will in no way affect the future of the American Decisions. A. C. Freeman, Esq., the well known author of "Law of Judgments," "Law of Executions," "Law of Co-tenancy," "Void Judicial Sales," "Enforcement of Judgments Against Bankrupts," etc., has been called to the chair made vacant by the death of the editor-in-chief. The publishers have issued a circular in which they say: "The assistants, who were with Mr. Proffatt from the commencement of the work, are all retained by the new management, and we congratulate the profession upon our having secured Mr. Freeman, ensuring, as it does the same high standard in the future volumes as in the past."——The Chief Justice of England, in a recent letter on the subject of the proposed criminal code, expresses himself thus on the subject of codification: "I have long been, for reasons on which it is unnecessary here to dwell, a firm believer in not only the expediency and possibility, but also in the coming necessity of codification; and I have rejoiced, therefore, at the favorable reception which the proposal to codify our criminal law has received from the press as of good omen. But it would, I think, be much to be deplored if the eager desire to see the law codified entertained by the public—of whom few have, perhaps, taken the trouble to study the details of the measure, and still fewer are in a position to appreciate the legal difficulties which present themselves—should lead to the adoption of a statement of the law still imperfect and incomplete. For not only would this be a misfortune as regards the work itself, and administration of justice under it, but any failure in this, our first attempt at what can properly be termed a code, would engender a distrust of this method of dealing with the law which would retard all further attempts at codification for an indefinite period."

THE legislature of New Hampshire has passed an act for the protection of the rights of holders of the bonds of repudiating States which may have important results. It provides that whenever any citizen of the State "shall be the owner of any claim" against any other State "arising upon a written obligation to pay money" which is overdue and unpaid, the holder may assign his claim to the State, and deposit the assignment with the attorney-general. Upon this deposit being made, it is to be the duty of the attorney-general to examine the claim and the evidence on which it rests, and if it is in his opinion good, to bring suit upon it in the name of the State in the Supreme Court of the United States. The expenses of the prosecution are to be paid by the owners of the claim. This is substantially the same act that was passed by the legislature of this State a year ago, and vetoed by the Governor. The legal theory on which it rests is very simple. The Constitution forbids suits being brought against States by citizens of other States, but not by States themselves, and the courts, while bound to protect a State from a suit of the prohibited kind, have always recognized the binding character of contracts made by States If there is any way of enforcing these they will always be enforced. The difficulty in the way of suing a State is merely technical, and if the technical difficulty can be removed there is no reason why a suit should not be maintained on a State bond as on any other form of obligation. All courts recognize the duty of a State to protect its citizens, and, consequently, if a State assumes the prosecution of claims on the defaulted bonds of other States there is every probability that the Supreme Court will favor the suit. On the other hand, it may be said that if a State can assume any claim of its citizens, and sue upon it at Washington, the immunity of States from private suits is practically gone.—*The Nation.*